

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. —

UNITED STATES OF AMERICA, APPELLANT

v.

JOHN W. COOK

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE

JURISDICTIONAL STATEMENT

ORDER BELOW

The order of the district court dismissing the indictment (R. 3, *infra*, p. 7) is not reported.

JURISDICTION

The order of the district court dismissing the indictment was entered on March 18, 1965. Notice of appeal to this Court was filed in the district court on April 16, 1965. The jurisdiction of this Court to review, on direct appeal, a judgment dismissing an indictment because of a construction of the statute on which the indictment is founded is conferred by 18 U.S.C. 3731.

(1)

STATUTE INVOLVED

18 U.S.C. 660 provides in pertinent part:

Whoever, being a president, director, officer, or manager of any firm, association, or corporation engaged in commerce as a common carrier, or whoever, being an employee of such common carrier riding in or upon any railroad car, motortruck, steamboat, vessel, aircraft or other vehicle of such carrier moving in interstate commerce, embezzles, steals, abstracts, or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property, or assets of such firm, association, or corporation arising or accruing from, or used in, such commerce, in whole or in part, or willfully or knowingly converts the same to his own use or to the use of another, shall be fined not more than \$5,000 or imprisoned not more than ten years, or both.

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QUESTION PRESENTED

Whether an indictment which charges an employee of an "individual engaged in commerce as a common carrier" with the theft of money of his employer arising from interstate commerce charges an offense under 18 U.S.C. 660.

STATEMENT

An indictment returned in the United States District Court for the Middle District of Tennessee alleged that respondent, a truck driver employed by Tolbert Hawkins, "an individual engaged in commerce as a common carrier," stole approximately

\$200.00 belonging to the carrier which had accrued from an interstate shipment of bananas (R. 5, *infra*, p. 8). On respondent's motion (R. 4), the district court dismissed the indictment. The court held that in charging that the respondent committed the proscribed acts as an employee of an "individual" common carrier, the indictment failed to charge an offense within 18 U.S.C. 660, which punishes the prohibited conduct only when committed by an employee of a "firm, association or corporation" engaged in commerce as a common carrier (R. 3, *infra*, p. 7).

THE QUESTION IS SUBSTANTIAL

Under the interpretation of 18 U.S.C. 660 adopted by the court below, the employee of an individual common carrier who embezzles funds of his employer is not guilty of a federal crime, although the same acts, if committed by an employee of a partnership or corporate carrier, would constitute a federal offense. We believe that this is an unreasonably narrow construction and one which is at odds with the underlying purpose of the statute. We believe the question to be important since we have been informed by the Interstate Commerce Commission that there are a substantial number of individual carriers who operate in interstate commerce, some of whom are fairly large employers. The issue may thus recur and should be settled.¹

¹ An interpretation similar to that adopted by the court below was adopted by the Court of Appeals for the Tenth Circuit in *Schmokey v. United States*, 182 F. 2d 937.

1. The statute punishes embezzlement by two groups: (1) "a president, director, officer, or manager of any firm, association, or corporation engaged in commerce as a common carrier" and (2) "an employee of such common carrier" riding on a vehicle of his employer moving in interstate commerce. Its literal language is broad enough to cover employees of individual common carriers. The word "firm", although often applied to a partnership, has also been defined as "the name, title or style under which a company transacts business." *Webster's Third New International Dictionary, Unabridged* (1961 ed.). Hence an individual owner, even if he does business under his own name, is operating as a "firm". Moreover, the Interstate Commerce Act defines "common carrier" as "persons, natural or artificial" (Interstate Commerce Act of 1887, Part I, 24 Stat. 379, as amended, 49 U.S.C. 1(3)(a)) and as "any person" (Motor Carrier Act of 1935, 39 Stat. 543, as amended, 49 U.S.C. 303(a)(14)). Consequently, the words "employee of such common carrier" should be construed to include employees of individual persons.

2. The legislative history of 18 U.S.C. 660 confirms the view that employees of an individual common carrier are subject to its provisions. The two classes of persons covered by the statute—officers and employees—were originally covered by separate provisions. The "employee" section was part of what is now 18 U.S.C. 659 (see 18 U.S.C. 409(a)(5) (1946 ed.)) and the "director" provision constituted a separate Section, 18 U.S.C. 412 (1946 ed.). These were combined in the 1948 revision of the Criminal Code.

The "director" provision derives from Section 9 of the Clayton Act, 38 Stat. 733-734. The "employee" section was enacted into law in 1946 as an amendment to an act of 1913, 37 Stat. 670, which punished theft from interstate commerce and which, in the intervening years, had been gradually expanded. As amended in 1946, the "employee" statute (60 Stat. 656, 657) read (emphasis added):

(a) Whoever shall—

* * * * *

(5) *being an employee of any carrier* riding in, on or upon any railroad car, motortruck, steamboat, vessel, aircraft, or other vehicle of such carrier transporting passengers or property in interstate or foreign commerce and having in his custody funds arising out of or accruing from such transportation, embezzle or unlawfully convert to his own use any such funds; shall in each case be fined not more than \$5,000 or imprisoned not more than ten years, or both.

Thus, before the 1948 revision, the section clearly covered employees of "any carrier," thereby including individual carriers. There is nothing to indicate that, when the revisers combined the two sections, they intended to narrow the scope of the "employee" portion. The present 18 U.S.C. 659 (of which the "employee" provision was once a part) reaches, *inter alia*, "whoever" steals and embezzles property which is part of an interstate shipment or baggage in the possession of "any common carrier," and this language surely includes the property of an individual carrier. There

is no reason to believe that Section 660 was meant to have any narrower coverage. The merger of the two separate provisions into Section 660 by the revisers, without comment as to scope, suggests that the revisers thought that "firm, association, or corporation" had the same meaning as "any such carrier" and that both covered an individual common carrier.

CONCLUSION

It is respectfully submitted that probable jurisdiction should be noted.

ARCHIBALD COX,
Solicitor General.

FRED M. VINSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

JUNE 1965.

APPENDIX

United States District Court for the Middle District
of Tennessee, Nashville Division

Criminal No. 13,717

UNITED STATES OF AMERICA

v.

JOHN W. COOK

ORDER

Upon motion of the defendant to dismiss the indictment in the above cause on the ground that it fails to charge an offense against the United States and upon argument of counsel, the Court is satisfied that the indictment, in charging that the defendant acted as an employee of "an individual" fails to charge a violation of 18 U.S.C., § 660 which only forbids the proscribed acts when committed by employees of a "firm, association or corporation", and it is accordingly

ORDERED, ADJUDGED AND DECREED by the Court that the indictment in the above cause be dismissed and that the Marshal release the defendant.

ENTER:

FRANK GRAY, Jr.,
United States District Judge.

Approved for Entry:

JAMES F. NEAL,
United States Attorney.
CARROL D. KILGORE,
Assistant U.S. Attorney.

March 18, 1965

United States District Court for the Middle District
of Tennessee, Nashville Division

Criminal No. 13,717 (18 U.S.C. § 660)

UNITED STATES OF AMERICA

v.

JOHN W. COOK

INDICTMENT

The Grand Jury charges:

On or about the 10th day of June 1964, in the Nashville Division of the Middle District of Tennessee, John W. Cook, being an employee, that is, a truck driver for Tolbert Hawkins, an individual engaged in commerce as a common carrier, riding in and upon a truck of such carrier moving in interstate commerce from Tampa, State of Florida, to Lebanon, State of Tennessee, wilfully and knowingly did embezzle, steal and convert to his own use monies of the said carrier arising and accruing from such commerce, to wit, the sum of approximately \$200.00, which sum was part of the monies of said carrier arising and accruing from an interstate shipment of bananas from Tampa, Florida, to Lebanon, Tennessee.

In violation of Title 18, United States Code, Section 660.

A TRUE BILL:

CLAUDE B. GARRISON
FOREMAN

JAMES F. NEAL
UNITED STATES ATTORNEY

